No. 00-883

In The

Supreme Court of the United States

JOE L. THORPE AND LINDA D. THORPE,

Petitioners,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

JOHN R. K. SOLT, ESQUIRE
Counsel of Record
C. COLLINS BROWN, ESQUIRE
BROWN, BROWN, SOLT & FERRETTI
1425 Hamilton Street
Allentown, PA 18102
(610) 433-6771

Attorneys for Respondent Redevelopment Authority of the City of Allentown

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Does the Petition raise an issue meriting review in the Supreme Court of the United States through its assertion that the Pennsylvania Eminent Domain Code does not provide a Condemnee with an opportunity to defend his/her property interests in accord with the due process clause of the United States Constitution, when the Pennsylvania Eminent Domain Code contains specific provisions regarding notice to a Condemnee upon the filing of a Declaration of Taking and procedural provisions by which a Condemnee may object to the taking and receive judicial review of such objections?

-(Negative answer sought by Respondent)

II. Does the Petition properly raise the issue of whether or not the Preliminary Objections should have been dismissed when the evidentiary hearing on the Preliminary Objections was conducted by a judge of the Lehigh county court of common pleas of Pennsylvania without a jury, when the Petitioner did not request a jury at the evidentiary hearing, did not raise any objection whatsoever as to the lack of a jury at this evidentiary hearing in any of their filings with the Lehigh county court of common pleas, did not raise this as an issue on appeal to the Pennsylvania commonwealth court, and did not raise this as an issue in its petition for allowance of appeal to the Pennsylvania supreme court?

-(Negative answer sought by the Respondent)

III. Does the Petition present an issue appropriate for a grant of Certiorari by asserting that the Pennsylvania state courts erred in dismissing

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the Petitioners' Preliminary Objections to the Declaration of Taking when the trial court promptly determined such Preliminary Objections as provided by the Pennsylvania Eminent Domain Code and made its order?

-(Negative answer sought by the Respondent)

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OBJECTION TO STATEMENT OF JURISDICTION OF THE SUPREME COURT

The Petition states that 28 U.S.C.A. §1254 (1988) provides the basis for jurisdiction for the Supreme Court of the United States for such Petition. 28 U.S.C.A. §1254 provides for the discretionary jurisdiction of the Supreme Court of the United Sates from cases in the federal courts of appeals upon the petition for a writ of certiorari of any party to any civil or criminal case, before or after rendition of judgment or decree, or by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court of the United States may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. This Petition does not present a civil or criminal case that was heard in any court of appeals, and as a consequence 28 U.S.C.A. §1254 does not provide the jurisdictional basis for this Petition to the Supreme Court. 28 U.S.C.A. §1257 (1988) provides a basis for jurisdiction for the Supreme Court from final judgments or decrees rendered by the highest court of a State in which a decision could be had. The highest court of the State in which a decision could have been had for the underlying case which is the subject of this Petition was the Pennsylvania supreme court. The Pennsylvania supreme court denied allocator by its order of August 30, 2000, and did not enter a judgement on the merits, but rather the Pennsylvania commonwealth court entered its Order on December 21, 1999 affirming the Order of the court of common pleas of Lehigh County, Pennsylvania.

COUNTER-STATEMENT OF THE CASE

The Petition's descriptions of the procedural history and facts in this case are so replete with inaccuracies or assertions having sparse relation to the record, and are so intertwined with argumentative charges masquerading as fact to which no competent evidence has been offered, as to almost defy any attempt at a concise point-by-point discussion. To the extent inconsistent with the procedural background and facts set forth below, the Petition's statement of the case should be regarded with great caution.

Procedural Background

The Redevelopment Authority of the City of Allentown (herein the "Respondent") filed its Declaration of Taking on January 28, 1999 in the court of common pleas of Lehigh County, Pennsylvania and filed a plan showing the condemned property in the Office of the Recorder of Deeds of Lehigh County, Allentown, Pennsylvania on the same date, for the property located at 235 North Fifth Street, Allentown, Pennsylvania (herein the "Condemned Property") owned by Joe Larry Thorpe and Linda D. Thorpe, husband and wife, (herein the "Petitioners"). Respondent duly served the Petitioners by personal service through the Lehigh County Sheriff's Department with the Declaration of Taking on January 29, 1999 pursuant to the Pennsylvania Eminent Domain Code, 1964, Sp.Sess., June 22, P.L. 84, art. IV, Amended 1969, Dec. 5, P.L. 316, §1, 26 P.S. §1-401 *et seq.*, (Purdons) at 26 P.S. §1-405. Petitioners filed Preliminary Objections on February 19, 1999. Respondent filed its Answer to the Preliminary Objections on March 12, 1999. Respondent served

such Answer and supporting Brief upon the Petitioners pursuant to the Eminent Domain Code. A status conference regarding this matter was held before the Honorable Judge Lawrence J. Brenner of the Lehigh County court of common pleas on March 15, 1999. By court Order, dated March 16, 1999, an evidentiary hearing on the Petitioners' Preliminary Objections was scheduled for April 7, 1999. At the date and time for hearing, April 7, 1999, counsel for Petitioners, Richard J. Orloski, Esquire and Orloski, Hinga & Pandaleon, filed a motion to withdraw as counsel for the Petitioners, Joe Thorpe and Linda D. Thorpe. Petitioners did not file any objection to this motion. After a hearing thereon, the Honorable Judge Lawrence J. Brenner issued a court Order, dated April 7, 1999, approving the withdrawal of Richard J. Orloski, Esquire and Orloski, Hinga & Pandaleon as counsel for the Petitioners and further Ordered that the evidentiary hearing on Petitioners' Preliminary Objections be continued to April 16, 1999.

On the afternoon of April 14, 1999, the Petitioners improperly served subpoenas on the Respondent, the City of Allentown, the Sacred Heart Hospital and the Morning Call, Inc., a local newspaper of general circulation, purporting to command the attendance of certain witnesses and the production of documents relating to the evidentiary hearing scheduled for 9:30 a.m. on Friday, April 16, 1999. Motions to Quash were filed by the Respondent, the City of Allentown, the Sacred Heart Hospital and the Morning Call, Inc. On April 15, 1999 upon consideration of the Motions to Quash filed by the above-named entities, and after hearing thereon, the Honorable Judge Lawrence J. Brenner entered various

Orders for the production of documents, attendance of certain witnesses at the evidentiary hearing and also entered certain protective Orders relating to the Petitioners' Subpoenas, which were determined to be overbroad and improperly served in that personal service was not made on former employees of the various entities.

An evidentiary hearing regarding the Petitioners' Preliminary Objections was held before the Honorable Lawrence J. Brenner on April 16 and 19, 1999. The court of common pleas of Lehigh County by its Order of June 1, 1999, overruled the Petitioners' Preliminary Objections and found that the Respondent, in conjunction with the Allentown City Planning Commission and the Council of the City of Allentown, prior to the filing of this Declaration of Taking for the subject property, conducted the necessary surveys and evaluations, prepared the proper reports and analysis, and further followed the proper procedural steps, including various public hearings, mandated by the Urban Redevelopment Law, 1945 May 24, P.L. 991, 35 Pa. C.S.A. § 1701 *et seq.* (herein the "URL"). (Appendix B of Petition @ pp. 4a-17a, in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County, Pennsylvania). Specifically, a blight survey was found to be conducted in the mid-1990's and the first public hearing on the blight certification was found to have occurred on February 18, 1998. Further, the blight certification was found to have occurred on or about April 14, 1998. (Appendix B of Petition @ pp. 4a-17a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County). The Honorable Lawrence J. Brenner found that

the Respondent, along with the other government entities, to wit: the Allentown City Planning Commission and the Council of the City of Allentown did not act arbitrarily, capriciously, in bad faith or fraudulently in the condemnation, but instead were fulfilling the public purpose of rehabilitation of blighted area by providing an urgently needed primary health care facility. (Appendix B of Petition @ p. 28a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

The Petitioners then filed an appeal to the commonwealth court of Pennsylvania at Docket No. 1595 C.D. 1999. The commonwealth court by its order of December 21, 1999 affirmed the order of June 1, 1999 of the court of common pleas of Lehigh County overruling Petitioners' Preliminary Objections. The commonwealth court specifically stated that it paged through the voluminous record and found no support for Petitioners' contention that the trial court abused its discretion in not allowing discovery and by ignoring important evidence. Further, the commonwealth court went on to provide that the Petitioners failed to point to disputed factual issues and failed to establish what evidence they were precluded from introducing into court. Finally, the commonwealth court provides that since the Petitioners failed to develop properly their argument that the trial court misapplied the law and the court could not act as an advocate, this argument was not reviewed since it was not properly briefed. (Appendix C of Petition @ p. 33a; Opinion of the Honorable James Garner Colins of the Commonwealth court of Pennsylvania).

On January 14, 2000, Petitioners then filed a petition for allowance of appeal to the Pennsylvania supreme court. The supreme court of Pennsylvania by order dated August 30, 2000, denied the petition for allowance of appeal. This Petition to the Supreme Court of the United States then followed.

Facts

The Redevelopment Authority by Resolution duly adopted on December 8, 1998, deemed it necessary to accomplish the public purposes of the URL contained in the duly adopted Redevelopment Proposal to acquire the property owned by the Petitioners located at 235 North Fifth Street, City of Allentown, Lehigh County, Pennsylvania, at the earliest practicable date and through the power of eminent domain, if necessary. On January 28, 1999, the Redevelopment Authority filed its Declaration of Taking condemning the Condemned Property of the Petitioners.

By way of additional information in order to specifically refute Petitioners' various allegations of fraudulent misrepresentation, threats, extortion, agreements to pay $300,000.00 in exchange for exercising the power of eminent domain, blight certification based on minor code violations and schemes to defraud the Petitioners, the following additional factual history developed at the evidentiary hearing and contained within the trial record is presented:

The Sacred Heart Hospital received a gift of real property located at 448 Chew Street, Allentown, Lehigh County, PA, from Donald B. Hoffman on April 3, 1973,

which is located approximately one city block more or less from the pertinent Petitioners' property. (R. @ p. 613). Thereafter, a sole property located at 450 Chew Street, Allentown, Lehigh County, PA was purchased on July 20, 1982 by the Sacred Heart Hospital. Twenty-seven other properties in and around Chew Street, Allentown, Lehigh County, PA, were acquired by Sacred Heart Hospital and were purchased on June 30, 1989 and thereafter. (R. @ pp. 613, 614). These real estate purchases by the Sacred Heart Hospital are of little consequence to these proceedings and this Respondent. This condemnation and its proceedings, deal with the actions of this Respondent and its authority under the URL with regard to blight and its removal. The acquisition of real property within the blighted area by the Sacred Heart Hospital prior to and after the blight certification, and Sacred Heart Hospital's willingness to develop this blighted area support the Respondent's decisions of how and who to develop this area as encompassed by its Redevelopment Proposal. (Appendix B of Petition @ pp. 4a-17a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

The HUD grant and a later state grant referenced by the Petitioners were not obtained by fraudulent misrepresentation. The Petitioners' statement to this affect is without any evidentiary support whatsoever and represents a mere unsubstantiated allegation. Petitioners did not present any evidence whatsoever at the evidentiary hearing in support of these allegations. Petitioners have previously proffered in their submissions to the Pennsylvania courts that the fraudulent misrepresentation within the HUD application to be as follows: the HUD application

contains a statement that, "(d)ue to the limited availability of off-street parking and to eliminate the potential for traffic congestion, the Center will include a four level 400 space parking deck", (R. @ p. 569), and since the Redevelopment Plan provides for use of Petitioners' property as a special-purposes parking area for the elderly, handicap, minors and pregnant women, such is inconsistent with the 400 space parking deck presented in the HUD application and therefore encompasses fraud. Two parking lots with differing purposes simply is not inconsistent and does not amount to fraudulent misrepresentation. Further, testimony at the evidentiary hearing established the existence of the 400 space parking deck (R. @ 570). Additionally, the Petitioners proffered at the evidentiary hearing that a further fraudulent misrepresentation in the HUD application included a statement that the Sacred Heart Hospital was the only hospital in Allentown. (R. @ 571). In fact, the HUD grant application did not contain a statement that the Sacred Heart Hospital was the only hospital in Allentown, but instead stated that, "(d)ue to its location, Sacred Heart Hospital bears almost the entire burden of treating the City's elderly, minority and low-income populations . . . (illustrating) Sacred Heart's unique status as the only community hospital in the City . . . ." (R. @ 572). Testimony at the evidentiary hearing regarding the services provided by Sacred Heart Hospital located in the inner city and as compared to the services provided by the other hospitals located in the western part of the city, supports this status of Sacred Heart as the "only community hospital in the city." (R. @ p. 572). Petitioners' allegations of fraudulent

misrepresentation are not supported by a scintilla of evidence, but are contradicted by a quantum of evidence. Finally, Petitioners' statement in footnote 1 to the Petition that there was an ongoing criminal investigation by the federal government regarding the HUD grant prior to the Respondent's filing of its Declaration of Taking is an inaccurate construction. Specifically, Petitioners made allegations to HUD, that the above grant was obtained by fraudulent misrepresentation. As a consequence, an investigation of these allegations ensued. The governmental entities and their representatives involved in the redevelopment activity were interviewed. No actions have been taken by HUD or any other federal governmental entity as a consequence of the Petitioners' allegations and HUD's investigation into the allegations.

Further, Petitioners allege a third party, the Sacred Heart Hospital, threatened that they would seek the use of eminent domain. It should be noted that these allegations are not allegations about this Respondent, but a third party, and therefore should not properly be considered in this matter without any showing that the third party had the authority to act on behalf of this Respondent or that this Respondent was the agent of the third party. Such a showing was not made in the evidentiary hearing. In any event, the evidence presented at the evidentiary hearing does not support the Petitioners' averment that the Sacred Heart Hospital threatened the Petitioners it would seek the use of the power of eminent domain in July of 1996. Rather, a letter of July 1996 from the Sacred Heart Hospital to the Petitioners, which was entered into evidence at the hearing before the Lehigh County court of common pleas, presented an offer to

purchase the subject real estate and nothing else. There is no mention whatsoever of the use of eminent domain by the Sacred Heart Hospital. In fact, any statement by the Sacred Heart Hospital as to the use of the power of eminent domain would be ludicrous, since it does not have this governmental power. (R. @ p. 615).

Petitioners allege that the Sacred Heart Hospital agreed to pay the Respondent $300,000.00 to use its power of eminent domain to take Petitioners' property. Observe that the Petitioners have never provided any factual support for this assertion in any of the court proceedings or appeals below. Further, although the assertion itself simply defies all logic, the Petitioners never explain why the Sacred Heart Hospital would be willing to pay the Respondent $300,000.00 for the use of its power of eminent domain, which is an amount nearly six times the highest appraisal value for Petitioners' property, while at the same time offering a devalued price to the Petitioners. The Respondent did not receive $300,000.00 for the use of its power of eminent domain to acquire Petitioners' property. By way of further information, the court of common pleas of Lehigh County, Pennsylvania found that the Sacred Heart Hospital, as redeveloper, had agreed to indemnify the Respondent for its part in the redevelopment of areas surrounding the Sacred Heart Hospital. The lower court has found that this agreement between the Sacred Heart Hospital and the Respondent regarding indemnification of the Respondent by the Sacred Heart Hospital is not indicative or representative of bad faith or collusion. Rather, the lower court noted that the Pennsylvania supreme court has held that such indemnification agreements are not per se

improper.[1] (Appendix B of the Petition @ footnote 11 on p. 28a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

Finally, the Petitioners allege that the City of Allentown and the Sacred Heart Hospital agreed by city ordinance to let the Petitioners' property alone, but thereafter as part of a scheme to defraud the Petitioners changed their minds. Initially, note that Petitioners' allegations do not involve actions of this Respondent and therefore should not properly be considered in this matter without any showing that the third party had the authority to act on behalf of this Respondent or that this Respondent was the agent of the third party. Such a showing was not made by the Petitioners in any proceeding regarding this matter in the lower courts. In any event, Petitioners attempted to provide evidence at the evidentiary hearing regarding a zoning ordinance to vacate a public street which ordinance also provided for alternate access to the Petitioners' property. Petitioners' characterization of this zoning ordinance as an agreement to leave their building alone is simply without any factual basis. The public record provides that the Sacred Heart Hospital agreed at a zoning hearing to allow Petitioners to gain access to their property by crossing the Hospital property.

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[1] Citing, *In the Matter of the Condemnation by the Township of Upper St. Clair v. Fryer*, 138 Pa. Cmwlth. 321, 324, 587 A.2d 907, 909 (1991). *See also, In re Condemnation of Land of Heim*, 151 Pa. Cmwlth. 438, 446-448, 617 A.2d 74, 78-79, *appeal denied* 535 Pa. 625, 629 A.2d 1385 (1992); *Washington Park, Inc. Appeal*, 425 Pa. 349, 356-357, 229 A.2d 1, 4-5 (1967).

REASONS FOR DENYING THE WRIT

In addition to numerous departures from what the Rules of the Supreme Court of the United States require of Petitions for Certiorari, the Petition here utterly fails to set forth any compelling reason consistent with the 28 U.S.C.A. U.S.Sup.Ct. Rule 10, suggesting some aspect of the decision of commonwealth court of Pennsylvania that might merit the attention of this Supreme Court of the United States. Not only is the opinion of the commonwealth court of Pennsylvania soundly reasoned, faithful to the teachings of the Supreme Court in analogous cases, and solidly grounded in the record, the Petition makes no attempt whatsoever to point to any decision of any federal court of appeals or any state court of last resort with which the underpinnings of the ruling below, or their application in this case, might be characterized as inconsistent. Further, the Pennsylvania supreme court denied the Petitioner's application for allocator, finding that there was not a single issue of immediate public importance justifying extraordinary jurisdiction of the Pennsylvania supreme court under 42 Pa. Con.Stat.Ann. §726 (Purdon 1978).

I. THE PETITION DOES NOT RAISE AN ISSUE MERITING REVIEW IN THE SUPREME COURT OF THE UNITED STATES THROUGH ITS ASSERTION THAT THE PENNSYLVANIA EMINENT DOMAIN CODE DOES NOT PROVIDE A CONDEMNEE WITH AN OPPORTUNITY TO DEFEND HIS/HER PROPERTY INTERESTS IN ACCORD WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, WHEN THE PENNSYLVANIA EMINENT DOMAIN CODE CONTAINS SPECIFIC PROVISIONS REGARDING NOTICE TO A CONDEMNEE UPON THE FILING OF A DECLARATION OF TAKING AND PROCEDURAL PROVISIONS BY WHICH A CONDEMNEE MAY OBJECT TO THE TAKING AND RECEIVE JUDICIAL REVIEW OF SUCH OBJECTIONS

The Eminent Domain Code, adequately protects a property owner's procedural and substantive due process rights. The Pennsylvania Eminent Domain Code contains the following very specific requirements regarding initiation of a condemnation proceedings:

> §1-402. Condemnation; passage of title; Declaration of Taking (a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a Declaration of Taking, with such security as may be required under section 403(a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.
>
> (b) The Declaration of Taking shall be in writing and executed by the condemnor, shall be

captioned as a proceeding in rem, and shall contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute, article and section thereof under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the Declaration of Taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned sufficient for the identification thereof, specifying the city, borough, township or town and the county or counties wherein the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in such county in accordance with section 404 of this act.

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

> (8) A statement of how just compensation has been made or secured.
>
> . . .

26 P.S. §1-402 (1969).

Section 1-402 of the Pennsylvania Eminent Domain Code surely passes constitutional muster in that it requires a condemnor to provide specific details about the taking, the property affected, and its authority to commence the taking.

Additionally, the Pennsylvania Eminent Domain Code provides for notice to the condemnee as follows:

> §1-405. Notice to condemnee (a) Within thirty days after the filing of the Declaration of Taking, the condemnor shall give written notice of the filing to the condemnee.
>
> (b) The notice shall be served within or without the Commonwealth, by any competent adult, in the same manner as a complaint or writ of summons in assumpsit, or by certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication of a copy of the notice omitting the plot plan required by subsection (c)(8), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.
>
> (c) The notice to be given the condemnee shall state:
>
> . . . (For 1-11reference the information contained in §1-402)

> (12) A statement that if the condemnee wishes to challenge the power or the right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the Declaration of Taking, he shall file Preliminary Objections within thirty days after being served with notice of condemnation.
>
> . . .

26 P.S. §1-405

Section 1-405 of the Pennsylvania Eminent Domain Code ensures that a property owner will receive adequate notice upon the filing of a Declaration of Taking, which notice is consistent with the procedural due process rights established by the Fourteenth Amendment to the United States Constitution as interpreted by this Supreme Court. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491 (1925), as cited by the Petitioners provides that statutes providing for condemnation of land may provide proceedings summary in character and for only indirect notice thereof.

Further, note that §1-404 of the Eminent Domain Code, 26 P.S. §1-404, provides for the recording of notice of condemnation in the Office of the Recorder of Deeds of the county in which the property is located.

Not only does the Pennsylvania Eminent Domain Code provide for adequate notice to a condemnee upon the filing of a Declaration of Taking that comports with the procedural due process rights as established by this Supreme Court, but the Pennsylvania Eminent Domain

Code also provides the condemnee with an opportunity to be heard, to wit:

> §1-406. Preliminary Objections (a) Within thirty days after being served with notice of condemnation, the condemnee may file Preliminary Objections to the Declaration of Taking. The court upon cause shown may extend the time for filing Preliminary Objections. Preliminary Objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the Declaration of Taking. Failure to raise these matters by Preliminary Objections shall constitute a waiver thereof.
>
> . . .
>
> (e) The court shall determine promptly all Preliminary Objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If Preliminary Objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific Declaration of Taking.

26 P.S. §1-406.

Pennsylvania courts have considered §1-406 of the Pennsylvania Eminent Domain Code and have found that, "(i)f a party has filed Preliminary Objections to Declaration of Taking, the trial court may not dismiss those objections without first conducting evidentiary hearing to resolve issues of fact in dispute. . . . Commonwealth Court is unable to properly perform appellate review of challenge to a Declaration of Taking without evidentiary record that is mandated by Eminent Domain Code when issues of fact have been raised. *Appeal of McKonly*, 152 Pa.Cmwlth. 211, 618 A.2d 1169 (1992). Further, the Pennsylvania commonwealth court held in *Appeal of Conway*, 432 A.2d 276, 60 Pa.Cmwlth. 520, (1981) that "(i)n an eminent domain proceeding, the trial court erred in dismissing condemnee's Preliminary Objections challenging redevelopment authority's designation of area as blighted, alleging that authority condemned premises for private not public purpose, and questioning sufficiency of bond attached to Declaration of Taking, without conducting evidentiary hearing." The Pennsylvania commonwealth court in the instant case has reviewed the evidentiary record, which clearly established that the Petitioners had an opportunity to be heard.

Pennsylvania courts have established that, "(d)ue process requires that condemnees be permitted to challenge validity of taking in some forum." *Appeal of Swidzinski*, 134 Pa.Cmwlth. 330, 579 A.2d 1352 (1980); Citing U.S. Const. amends. V, XIV. A conflict does not exist between the Pennsylvania courts and the Supreme Court of the United States. In, *Condemnation by the Urban Redevelopment Authority of Pittsburgh*, 527 Pa. 550, 594

A.2d 1375 (1991) the Pennsylvania supreme court, citing U.S. Const. amend. XIV, reviewed the procedures of the URL, Eminent Domain Code and case law and found that they are adequate to protect the property interest of condemnees even at the initial stages of the redevelopment process, thereby satisfying the due process requirement that those affected have an opportunity to voice their objection. *Id.* @ 559. Further, the Pennsylvania supreme court has found that on review in a condemnation proceedings by a redevelopment authority , the "condemnee should be given an opportunity to prove that certification of blight was arbitrary or capricious. . . . That opportunity . . . does not require the lower court to substitute its discretion for that of the legislatively-granted discretion of the Commission." *Simco Stores v. Redevelopment Authority of the City of Philadelphia*, 455 Pa. 438, 442, 317 A.2d 610, 613 (1974). The Petitioners were appropriately given the opportunity by the hearing court to prove the certification of blight was arbitrary or capricious, but they have utterly failed in this regard. The Petitioners present nothing new, nor point to any inconsistency or conflict with the decisions of the supreme court of Pennsylvania or the Supreme Court of the United States, nor point to anything in this instant case which so departs from the usual course of judicial proceedings, that would allow an appeal of this final order of the commonwealth court of Pennsylvania.

Petitioner fails to establish how this Pennsylvania statutory scheme and the decisions of Pennsylvania courts regarding this statute are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution or how the lower courts erred

in its application of the statutory scheme to the Petitioners in particular. Petitioner correctly provides that a State prior to taking any action affecting an interest in property must provide notice that is reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action, such notice ensuring the opportunity to be heard. *Citing, Mennonite Bd. of Missions v. Adams,* 426 U.S. 791 (1982); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The Pennsylvania Eminent Domain Code absolutely affords condemnees with notice and an opportunity to be heard and the record below establishes that Petitioners absolutely received notice and Petitioners were absolutely heard in compliance with the Pennsylvania Eminent Domain Code. Petitioners' only argument or perhaps observation is that the hearing court promptly scheduled this condemnation matter for an evidentiary hearing 77 days after the Declaration of Taking had been filed. Although, Petitioners are certainly correct in generally observing that certain civil actions are not resolved until years after the initiation of the action, the Petitioners fail to explain why this observation supports their contention that the Pennsylvania Eminent Domain Code either is unconstitutional or was construed in a fashion as to be unconstitutional in their case. Section 1-406(e) of the Pennsylvania Eminent Domain Code mandates that the trial court promptly determine all Preliminary Objections and make such orders as justice requires, including the revesting of title. The Eminent Domain Code requires a prompt determination to ensure, among other things, that if it is determined by the hearing judge that the Preliminary Objections should be granted, that the property owner be

revested with title immediately. Prompt determination of Preliminary Objections can limit the interference with or interruption of property rights. Prompt determination of Preliminary Objections also permits the process for the determination and payment of just compensation to be expedited. This procedure is not violative of the United States Constitution, but is consistent with its protection of interests in property.

II. THE PETITION DOES NOT PROPERLY RAISE THE ISSUE OF WHETHER OR NOT THE PRELIMINARY OBJECTIONS SHOULD HAVE BEEN DISMISSED WHEN THE EVIDENTIARY HEARING ON THE PRELIMINARY OBJECTIONS WAS CONDUCTED BY A JUDGE WITHOUT A JURY, WHEN THE PETITIONER DID NOT REQUEST A JURY AT THE EVIDENTIARY HEARING, THE PETITIONER DID NOT RAISE ANY OBJECTIONS TO THE LACK OF A JURY AT THIS EVIDENTIARY HEARING OR IN ANY OF THEIR FILINGS WITH THE LEHIGH COUNTY COURT OF COMMON PLEAS, THE PETITIONER DID NOT RAISE THIS AS AN ISSUE ON APPEAL TO THE PENNSYLVANIA COMMONWEALTH COURT, AND THE PETITIONER DID NOT RAISE THIS AS AN ISSUE IN THEIR PETITION FOR ALLOWANCE OF APPEAL TO THE PENNSYLVANIA SUPREME COURT

The Petitioners raise the issue of whether or not the evidentiary hearing should have been held before a jury for the first time in this Petition to this Supreme Court of the United States. This Supreme Court has clearly established that an argument raised for the first time to the Supreme Court which has not been raised or resolved in lower courts will not be considered, absent a showing of

unusual circumstances. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990); *City of Springfield Massachusetts v. Kibbe*, 480 U.S. 257, *rehearing denied*, 481 U.S. 1033 (1987); Fed.R.Civ.P. 51 (1993), 28 U.S.C.A. U.S.Sup.Ct. Rule 14.1(a), 24.1(a). Petitioner has not provided any showing of unusual circumstances, and in fact has not addressed the issue that this matter is being raised for the first time in this Petition.

Further, consideration of the substantive issue raised in the Petition of whether or not the presence of a jury is a constitutional requisite at an evidentiary hearing in a condemnation proceeding to determine whether or not the governmental authority has acted properly and within its authority to take property for a public purpose, clearly has been answered in the negative. This Supreme Court has stated that, "when the government initiates formal condemnation procedure, a landowner may question whether the proposed taking is for a public purpose. The landowner who raises this issue, however, seeks not to establish the government's liability for damages, but to prevent the government from taking his property at all. . . . (I)t should be no surprise, then, that the landowner is not entitled to a jury trial on his entitlement to a remedy that sounds not in law but in equity." *City of Monterey v. Del Monte Dunes @ Monterey, Ltd.*, 526 U.S. 687, 713 (1999). Further, "this Court has said 'that there is no constitutional right to a jury in an eminent domain proceeding'." *Id.* @ 711; *citing, U.S. v. W.G. Reynolds*, 397 U.S. 14, 18 (1970); *accord, Bauman v. Ross*, 167 U.S. 548 (1897).

Consider additionally that, "In eminent domain proceedings there is no right under this Amendment (Fourteenth Amendment to the United States Constitution) to a 'trial by jury,' and whether or not the damages of the landowner shall be assessed by a jury is a question of practice and procedure to be determined in accordance with the relevant state law." *U.S. v. 86.6 Acres of Land in Merrimack County,* 44 F.Supp. 495 (N.H. 1942). Consider also the following directly pertinent case in which it was held that a "(h)earing at which evidence is taken in condemnation action by the Department of Transportation (DOT) does not infringe upon landowner's state and federal rights to a jury trial, as one purpose of the hearing is to resolve any preliminary questions as to what land DOT is condemning and any question as to its title before any jury trial on the issue of damages." *Department of Transportation v. Wolfe,* 449 S.E.2d 11, 116 N.C. App. 655 (1994). Finally, consider the long line of cases which clearly provide that the Fourteenth Amendment to the United States Constitution "does not require that eminent domain suits brought by the United Stats for taking property for public use be tried by a jury." *Gila River Ranch, Inc. v. U.S.,* 368 F.2d 354 (Ariz. 1966); *U.S. v. Buhler,* 254 F.2d 876 (Tex. 1958); *City of Honolulu v. U.S.,* 188 F.2d 459 (Hawaii 1951), *certiorari denied,* 342 U.S. 849; *U.S. v. Meyer,* 113 F.2d 387 (Ill. 1940), *certiorari denied,* 311 U.S. 706; *U.S. v. Kennesaw Mountain Battlefield Ass'n,* 99 F.2d 830 (Ga. 1939), *certiorari denied,* 306 U.S. 646; *U.S. v. 2,049.85 Acres of Land, More or Less, in Nuess County, Texas,* 49 F.Supp. 20, (Tex. 1943); *U.S. v. Alexander,* 47 F.Supp. 900 (Va. 1942).

Additionally consider, by analogy Rule 71A(h) (1993) of the Federal Rules of Civil Procedure, which provides that:

> "If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for determination of that issue, but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed . . . unless the court in its discretion orders that, because of the character, location or quantity of the property to be condemned, or for other reasons in the interests of justice, the issue of just compensation shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court."

Fed. R. Civ. P. 71A(h).

This Supreme Court, in discussing Rule 71A(h), has clearly indicated that the issue of a jury trial at an eminent domain proceedings is not a Seventh Amendment issue. *U.S. v. W.G. Reynolds*, 397 U.S. 14, 17 (1970). *See also, KLK, Inc. v. U.S. Dept. of Interior*, 35 F.3d. 454 (Alaska 1994); *U.S. v. 158.24 Acres of Land, More or Less, in Bees County Texas*, 515 F.2d. 230 (Tex. 1975). Clearly, even the substantive issue presented in the Petition has been resoundingly determined in a contrary fashion than indicated by the Petitioners.

III. THE PETITION DOES NOT PRESENT AN ISSUE APPROPRIATE FOR A GRANT OF CERTIORARI BY ASSERTING THAT THE PENNSYLVANIA STATE COURTS ERRED IN DISMISSING THE PETITIONERS' PRELIMINARY OBJECTIONS TO THE DECLARATION OF TAKING BECAUSE THE TRIAL COURT PROMPTLY DETERMINED SUCH PRELIMINARY OBJECTIONS AS PROVIDED BY THE PENNSYLVANIA EMINENT DOMAIN CODE

The Petitioners argue that the courts below allowed the Petitioners' Preliminary Objections to be determined in an expeditious fashion which denied them a reasonable opportunity to conduct discovery and obtain a fair hearing in this matter. Upon consideration of contentions regarding the discovery period, the Lehigh County court of common pleas discovery rulings and any impact on the Petitioners' right to a fair hearing, the Pennsylvania commonwealth court found that the "Condemnees fail(ed) to point to disputed factual issues and fail(ed) to establish what evidence they were precluded from introducing into court." (Appendix C of Petition @ p. 33a, in Opinion of the Honorable James Gardner Colins) This Petition to the Supreme Court of the United States simply provides a time table of the proceedings in the Declaration of Taking, and without more, asserts that there was a deprivation of property, with no opportunity to protect constitutionally guaranteed interests. Once again the Petitioners have failed to provide any explanation whatsoever why the notice, the discovery period, and the evidentiary hearing failed to protect their constitutional rights.

Any discovery and evidentiary issues contained within the Petition truly do not merit the review of the Supreme Court of the United States. Discovery and evidentiary issues are matters that traditionally have been found to be within the sound discretion of the trial court. The Petitioners have not established that the courts below have abused their discretion with regard to this discovery matter simply by providing a time table without any reasons, rationale or analysis. The Petitioners merely assert their constitutional rights have been violated without more. Consider that the Petitioners in this matter did not conduct any discovery or make any attempts to conduct discovery until a day and half before the evidentiary hearing. Consider also that the hearing judge entered various orders for production of documents and attendance of witnesses at the evidentiary hearing. All of these determinations by the hearing judge were made pursuant to the various Pennsylvania statues, including the Eminent Domain Code and the Pennsylvania Rules of Civil Procedure. Many items requested in this last minute discovery by the Petitioners were largely part of the public record and were easily obtainable by the Petitioners through requests under Pennsylvania's Right to Know Law. The hearing judge nonetheless issued orders for production of many documents requested by the Petitioners. It is obvious that the hearing judge was cognizant of the Petitioners' property interest and was making every effort to afford the Petitioners' due process of the law in spite of the Petitioners' failures to utilize the discovery methods available to them under Pennsylvania law. Considering these facts pertaining to the discovery process and discovery requests in the proceeding below,

it cannot be said that the trial judge abused the court's discretion so as to deprive the Petitioners of meaningful discovery to protect their property interests. Further, it is equally clear that Petitioners did not provide any analysis or information why the extension of the discovery period would have made the evidentiary hearing more meaningful or more reasonable. The hearing court determined that the discovery period should not be extended, which determination is within its sound discretion. This determination not to extend discovery certainly cannot be determined to be an abuse of discretion in light of the readily available public record and the mandate under the Section 406(a)(e) of the Eminent Domain Code, 26 P.S. §§1-406(a), to proceed "expeditiously" in its rulings and determinations regarding Preliminary Objections to a Declaration of Taking, nor can these mandates of the Pennsylvania Eminent Domain Code be viewed as unconstitutional.

Even if this Supreme Court determines that the discovery and evidentiary matters raised by the Petition should not be evaluated as a discretionary determination within the sound discretion of the hearing court, but instead considers these matters as a constitutional query, such issues do not rise to the level to merit consideration by this Court. This matter presented as a constitutional query has already been determined by this Court as follows: "It has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature

of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U.S. 559 (1889); *Ballard v. Hunter*, 204 U.S. 241, 262 (Ark. 1907). "The necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Joslin Co. v. Providence*, 262 U.S. 668, 678 (1923); *Georgia v. Chattanooga*, 264 U.S. 472, 483 (1924). *North Laramie, supra.* As discussed in Argument I herein, the Pennsylvania Eminent Domain Code not only satisfies these constitutional mandates, but exceeds these requirements as is consistent with *Mullane, supra.*

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits that it should be apparent that the Petition sets forth no basis for concluding that the Pennsylvania commonwealth court's decision was incorrectly determined. Further, the Petition does not present an issue that warrants resolution or elaboration by this Honorable Court. Accordingly, the Petition should be denied.

Respectfully submitted,

JOHN R. K. SOLT, ESQUIRE
Counsel of Record

C. COLLINS BROWN, ESQUIRE
BROWN, BROWN, SOLT & FERRETTI
1425 Hamilton Street
Allentown, PA 18102
(610) 433-6771

Attorneys for Respondent
Redevelopment Authority of
the City of Allentown